Supreme Court, U.S.
FILED
JUL 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

87-86

No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

RICHARD WILDERMUTH,
*Appellant,*

v.

COMMONWEALTH OF PENNSYLVANIA,
*Appellee.*

## ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

## JURISDICTIONAL STATEMENT

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## QUESTIONS PRESENTED

1. Whether a mandatory minimum sentence of five years incarceration for an eighty-three year old man suffering from coronary dysfunction and organic brain deterioration causally related to his crime in a prison system ill-equipped to handle his physical and mental disabilities is cruel and unusual punishment as prohibited by the Eighth Amendment of the Constitution of the United States.

2. Whether the general Pennsylvania sentencing statute codified at 42 Pa. C.S. §9756, which provides that a judge in imposing a sentence of total confinement must determine whether such sentence will commence in a correctional or other appropriate institution, must be applied to mandatory sentences of incarceration in order to obviate any prohibition against cruel and unusual punishment.

3. Whether the statute providing for a mandatory prison sentence for offenses committed against infant persons, codified at 42 Pa. C.S. §9718, violates the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States in that it does not place a limit on the age of the defendant against whom it may be applied as does the otherwise identical mandatory sentencing statute for offenses committed against the elderly, codified at 42 Pa. C.S. §9717.

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v.

COMMONWEALTH OF PENNSYLVANIA,
*Appellee.*

## ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

## JURISDICTIONAL STATEMENT

Richard Wildermuth, the appellant, appeals from the final judgment of the Supreme Court of Pennsylvania, dated April 20, 1987, which dismissed the appeal from the order of the Superior Court of Pennsylvania holding that the Pennsylvania mandatory minimum sentencing statute for offenses committed against infant persons, 42 Pa. C.S. §9718, as applied in this case, is not unconstitutional as being violative of the Eighth Amendment and the Fourteenth Amendment of the United States Constitution.

## OPINIONS BELOW

The judgment of the Supreme Court of Pennsylvania, not reported, appears in the Appendix (1a-2a). The opinion of the Superior Court of Pennsylvania, which appears in the Appendix (3a-10a), is reported at 347 Pa. Super. 640, 501 A.2d 258 (1985).

The opinion of the Court of Common Pleas of Bucks County, Pennsylvania, which appears in the appendix (12a-17a) is reported at 46 Bucks 215 (1985).

## JURISDICTION

The judgment of the Supreme Court of Pennsylvania dismissing the appeal from the Order of the Superior Court of Pennsylvania was entered on April 20, 1987. (1a). A notice of appeal to this Court was timely filed in the Supreme Court of Pennsylvania on April 29, 1987. (19a). This appeal is being docketed in this Court within 90 days from the entry of Judgment of the Supreme Court of Pennsylvania. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

## CONSTITUTIONAL PROVISIONS AND STATUTES

**Eighth Amendment, United States Constitution**

Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishment inflicted.

**Fourteenth Amendment, United States Constitution**

No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

**42 Pa. C.S. §9718**

(a) Mandatory sentence.—A person convicted of the following offenses when the victim is under 16 years of age shall be sentenced to a mandatory term of imprisonment as follows:

18 Pa. C.S. §2702(a)(1) and (4) (relating to aggravated assault)—not less than two years.

18 Pa. C.S. §3121 (relating to rape)—not less than five years.

18 Pa. C.S. §3121 (relating to involuntary deviate sexual intercourse)—not less than five years.

(b) Eligibility for parole.—Parole shall not be granted until the minimum term of imprisonment has been served.

**42 Pa. C.S. §9717**

(a) Mandatory sentence.—A person under 60 years of age convicted of the following offenses when the victim is over 60 years of age and not a police officer shall be sentenced to a mandatory term of imprisonment as follows:

18 Pa. C.S. §2702(a)(1) and (4) (relating to aggravated assault)—not less than two years.

18 Pa. C.S. §3121 (relating to rape)—not less than five years.

18 Pa. C.S. §3123 (relating to involuntary deviate sexual intercourse)—not less than five years.

18 Pa. C.S. §3922 (relating to theft by deception)—not less than 12 months, but the imposition of the minimum sentence shall be discretionary with the court where the court finds justifiable cause and that finding is written in the opinion.

(b) Eligiblity for parole.—Parole shall not be granted until the minimum term of imprisonment has been served.

**42 PA. C.S. §9756**

(a) General Rule.—In imposing a sentence of total confinement, the court shall at the time of sentencing specify any maximum period up to the limit authorized by law and whether the sentence shall commence in a correctional or other appropriate institution.

## STATEMENT OF THE CASE

### A. The Federal Question Was Raised

On November 15, 1984, appellant, Richard Wildermuth pleaded guilty to involuntary deviate sexual intercourse with a person less than sixteen years of age, 18 Pa. C.S. §3123(5), and related charges. Upon the entry of his plea, the Honorable William Hart Rufe, III, imposed upon Mr. Wildermuth a prison sentence of not less than five years nor more than ten years. Upon the imposition of this sentence, Judge Rufe stated that this sentence was dictated by the mandatory sentencing statute 42 Pa. C.S. §9718, and that this statute precluded any discretion on his part in sentencing.

Mr. Wildermuth filed a Motion for Modification of the Sentence on November 26, 1984. This Motion requested that the Court find the mandatory minimum sentencing provision of 42 Pa. C.S. §9718 to be in violation of the Eighth and Fourteenth Amendments of the Constitution of the United States. This Motion was denied by Judge Rufe in an order dated December 7, 1984 and in an opinion dated February 14, 1985, (12a).

On December 12, 1984, Mr. Wildermuth filed an Appeal in the Superior Court of Pennsylvania. The Eighth and Fourteenth Amendment claims were reiterated by the appellant before the Superior Court. On November 22, 1985, the Superior Court affirmed the trial court's denial of the Motion for Modification of Sentence and upheld the constitutionality of 42 Pa. C.S. §9718. (3a).

On December 19, 1985, appellant petitioned the Supreme Court of Pennsylvania for allowance of appeal raising the issue of the statute's violation of the Eighth and Fourteenth Amendments of the United States Constitution. The allowance of appeal was granted on October 30, 1986. In its order granting the allowance of appeal, the Pennsylvania Supreme Court specifically directed the parties to include in their briefs and arguments the issue of whether 42 Pa. C.S. §9756 applies to mandatory sentences of incarceration and whether, on the facts of this case, its application is necessary to obviate any prohibi-

tion against cruel and unusual punishment. After full briefing and oral argument, the Supreme Court of Pennsylvania dismissed the appeal as improvidently granted on April 20, 1987. (1a).

**B. Statement of Facts**

The facts as set forth below were made known to the trial court prior to the imposition of the sentence. Due to the Court's interpretation of its mandatory sentencing responsibilities, this uncontested information was determined to be irrelevant.

The defendant, Richard Wildermuth, is an eighty-three year old man whom the probation department found to be a good, hardworking and loving husband, father and grandfather. He has had a stable and loving marriage for fifty-four years and has provided a happy home for his family. Mr. Wildermuth had no prior history of antisocial behavior or sexual abnormalities. Psychiatrists have determined that Mr. Wildermuth is suffering from organic brain deterioration but that there is no evidence of psychosis, thought disorders or hallucinations. *See,* Dr. Richard Ievoli's report (21a). For this reason, a guilty but mentally ill plea could not have been entered.

Due to the organic brain deterioration, Mr. Wildermuth suffers from memory impairment which resulted in his being unable to recall any of the incidents giving rise to his offense. This same psychological impairment evidently influenced Mr. Wildermuth's behavior by blunting ordinary inhibitions. Lacking these social controls, he became susceptible to committing the crimes for which he was charged. Recently Mr. Wildermuth has begun to suffer coronary dysfunction. *See,* Dr. William Levy's report (26a). His doctors have stated that due to his age and confused state of mind, the effect of incarceration will necessarily "hasten his decline and possibly result in death." *See* Dr. Bijan Etemad's report (28a).[1]

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[1] Mr. Wildermuth's physical condition has further deteriorated since the filing of this appeal. On June 26. 1987, Mr. Wildermuth was diagnosed as having cancer of the prostate gland. Mr. Wildermuth's physicians indicate

*(footnote continues)*

Mr. Wildermuth pleaded guilty to involuntary deviate sexual intercourse. The incident which resulted in this offense was the sexual abuse of two children. The acts for which the defendant pleaded guilty appear to follow a recognized pattern of isolated pedophiliac-type acts committed by the elderly.[2] Mr. Wildermuth had a longstanding relationship with the children-complaintants. Both children were frequent visitors to the Wildermuth home. In neither case is it alleged that the children were victims of violent abuse.

These aspects of the allegations against the defendant seem to fit the description of "sex-pressure" offenses described in the medical literature.[3] The persons who commit such offenses care for the child and emotionally identify with him or her.[4] As in the instant case, attempts are made to establish a personal relationship, however tentative or inappropriate.[5]

The irrational results dictated by the mandatory sentencing statute in the instant case were not lost on either the lower court or the prosecutor. At one point in the proceedings, the initially assigned Assistant District Attorney indicated her belief that

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*(footnote continued)*

that surgery will be necessary. Prior to surgery, Mr. Wildermuth's physicians cannot determine if surgery will be successful and the effect of this surgery and cancer on his physical condition. Prior to surgery, Mr. Wildermuth's physicians cannot determine the extent of additional medical treatment which will be required following surgery.

[2] The preferential or exclusive use of prepubertal children, by act or fantasy for the purpose of achieving sexual excitement.

[3] J. K. Meyer, Chester Schmidt and Thomas Wise, *Clinical Management of Sexual Disorders,* 285 (2d Ed. 1983).

[4] A. Nicholas Groth and Ann Wolbert Burgess, *Motivational Intent on the Sexual Assault of Children.* 4 Criminal Justice and Behavior, 253-264, (September, 1977).

[5] While the literature suggests an extremely low rate of recidivism among sexual offenders, there is even less of a possibility of a repeat offense in the instant case. Since the filing of the charges against him, Mr. Wildermuth has voluntarily undergone in-patient psychiatric treatment at Horsham Clinic. He has sold his home and moved out of the community. His continued treatment, coupled with his relative isolation, virtually eliminates the possibility of recidivism.

mandatory minimum sentencing was inappropriate. On another occasion, the Judge first assigned the case stated that he would not impose a mandatory minimum sentence were it not required by the legislature. This Court must prevent these irrational results from becoming a reality and declare this act unconstitutional.

## THE QUESTION IS SUBSTANTIAL

### A. The Pennsylvania Courts' Determination That A Mandatory Minimum Sentence of Five Years Incarceration For An Eighty-Three Year Old, Suffering From Coronary Dysfunction And Organic Brain Deterioration Causally Related To His Crime, In A Prison System Ill-Equipped To Handle His Physical And Mental Problems Is Not Cruel And Unusual Punishment Decided A Question Of Substance Not Heretofore Determined By this Court

The question as to the Eighth Amendment implications of a five year mandatory minimum sentence for an eighty-three year old is a novel and substantial one. It has never been treated before by this Court.

Application of the Eighth Amendment's bar against cruel and unusual punishment is not limited to the physically barbarous. It also prohibits the unnecessary and wanton infliction of pain. *Gregg v. Georgia,* 428 U.S. 153, 173 (1976), *reh. denied,* 429 U.S. 875 (1976). It forbids punishment which is grossly disproportionate to the severity of the crime. *Rhodes v. Chapman,* 452 U.S. 337, 346 (1981). Counsel concede that on its face a mandatory sentence of five years imprisonment for the conviction of involuntary deviate sexual intercourse does not appear grossly disproportionate to the severity of the crime. The imposition of that penalty *in the instant case,* however, must be regarded as disproportionate to the severity of the crime.

The state prison system has no specialized facility to treat the malady, organic brain syndrome, which caused the crime. The defendant also suffers from coronary dysfunction. Sending

this defendant to a prison ill-equipped to deal with such illnesses for five years is cruel and unusual punishment. It is nothing less than a death sentence.

The most recently available statistics indicate that only .4% of the inmate population in the Pennsylvania prison system is age sixty-five or older.[6] These fifty-one individuals are not imprisoned in one facility equipped to handle their needs. Rather they are scattered throughout the various state facilities.[7] Most significantly there are no available statistics indicating how many of these fifty-one individuals are in fact past the age of eighty.

Not surprisingly, Pennsylvania has no prison facility specially designed to meet the needs of the aged and infirm. Although all of the facilities have infirmaries, none of them are specifically equipped to handle severe coronary and geriatric mental problems. Although "social" programs and nutritional supervision for the elderly are available in some of the facilities,[8] Mr. Wildermuth requires special care. An eighty-three year old suffering from coronary dysfunction and prostate cancer will require more than a few social programs and nutritional resources in order to survive five years of imprisonment.

The concept of cruel and unusual punishment is one of wide application, capable of acquiring new depth of meaning to conform to more enlightened concepts of criminal justice. *Commonwealth ex rel. Bryant v. Hendrick,* 444 Pa. 83, 95, 280 A.2d 110, 116 (1971). In his appeal, Mr. Wildermuth contended that no enlightened concept of criminal justice could condone sending a first time offender, with no prior history of anti-social behavior to prison to die, certainly not where his crime is symptomatic of the infirmities of old age.

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[6] Pennsylvania Bureau of Corrections. *1984 Annual Statistical Report* 15 (1985). Other recently available statistics indicate that between the years 1980 and 1985 only .2% of the defendants sentenced to state correctional facilities were age sixty-five or older. *See* Pennsylvania Department of Corrections. *Statistical Report For The Years 1980-1985.*

[7] Id.

[8] Pennsylvania Bureau of Correction, *Counseling Manual* IV-2 (1984).

This Court has held that the government has an obligation to provide medical care for those whom it is punishing by incarceration. *Estelle v. Gamble,* 429 U.S. 97, 102-03 (1976), *reh. denied,* 429 U.S. 1066 (1977). Counsel concedes that the Pennsylvania prison system will provide some form of medical care to Mr. Wildermuth. However, it is the adequacy of that care which is the issue. In *Estelle,* this Court stated that failure to provide medical care may actually produce "physical torture or a lingering death." *Id.* No lawyer's eloquence could better describe Mr. Wildermuth's plight than the conclusion of his doctor that incarceration will hasten his decline and possibly result in death. Sentencing Mr. Wildermuth to five years imprisonment in an environment not designed to meet his needs is clearly a sentence to a lingering death.

This Court has not previously determined whether the application of mandatory minimum sentencing provisions to a mentally and physically ill eighty-three year old violates the Eighth Amendment's prohibition against cruel and unusual punishment. The Eighth Amendment stands to assure that the States' power to punish be exercised within the limits of civilized standards. *Trop v. Dulles,* 356 U.S. 86, 100 (1958). Civilized standards require a judge to consider the age and background of the defendant, the nature of the offense and the effect of incarceration on that defendant before imposing any sentence of imprisonment. Failure to consider these circumstances and factors results in the infliction of cruel and unusual punishment.

Eighty-five percent of the inmate population in Pennsylvania is under the age of forty. A system designed to handle the needs of these individuals cannot possibly facilitate the unique and special needs of an ill eighty-three year old. Without adequate facilities, Mr. Wildermuth's imprisonment is clearly cruel and unusual punishment.

In sum, a judge must be permitted to consider all of the factors and circumstances pertaining to the defendant's background, his rehabilitative needs, and the protection of the public before imposing a sentence on an eighty-three year old

family man with no prior criminal record. The literal application of 42 Pa. C.S. §9718 results in cruel and unusual punishment for Mr. Wildermuth. Lengthy incarceration will serve no just purpose.

The Eighth Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society. *Trop v. Dulles,* 356 U.S. 86, 101 (1958). Today's standards of decency require this Court to reconsider the Pennsylvania Supreme Court's determination that 42 Pa. C.S. §9718 as applied to Mr. Wildermuth does not violate the constitutional prohibitions against cruel and unusual punishment.

**B. The Pennsylvania Courts' Refusal To Consider The Sentencing Mandate of 42 Pa. C.S. §9756 Resulted In Cruel And Unusual Punishment Being Inflicted Upon Mr. Wildermuth**

During sentencing, the trial court stated that it was sentencing Mr. Wildermuth to five years incarceration in a state correctional institution because the sentence was dictated by the mandatory minimum sentencing provisions of 42 Pa. C.S. §9718. The court indicated that despite all of the factors and circumstances set forth in the pre-sentence investigation, these factors were irrelevant in light of the legislature's enactment of 42 Pa. C.S. §9718. The trial court's interpretation of 42 Pa. C.S. §9718 was incorrect.

In enacting 42 Pa. C.S. §9718, the legislature mandated a minimum sentence of five years imprisonment for the violation of any of the specified crimes. The legislature did not mandate, however, the specific institutions in which the five year sentence was to be served. The sentencing statute codified at 42 Pa. C.S. §9756 requires that the court and not the legislature determine in which appropriate state institution a sentence should be commenced.

Appellant concedes that it did not specifically raise the issue of the applicability of 42 Pa. C.S. §9756 when it challenged the constitutionality of 42 Pa. C.S. §9718 in the trial

court and the Pennsylvania Superior Court. The Pennsylvania Supreme Court, however, specifically directed the parties to address this issue in the appeal before the Supreme Court. It must be concluded, however, that had the lower courts considered other appropriate institutions as required by 42 Pa. C.S. §9756, the legislature's mandate of a minimum five year sentence could have been enforced without the infliction of cruel and unusual punishment upon Mr. Wildermuth.

The general sentencing provision codified at 42 Pa. C.S. §9756 requires that at the time of sentencing, a court must specify in which appropriate institution a sentence of confinement must commence. In the instant matter, the trial court did not apply the mandate of 42 Pa. C.S. §9756. The court concluded that the mandatory minimum sentencing provision of 42 Pa. C.S. §9718 required a minimum five year sentence of imprisonment in a state correctional institution.

The mandatory minimum sentencing statute does not require a minimum sentence to a state correctional institution. The statute merely requires a five year minimum sentence of imprisonment. The statute imposes no requirements concerning the place of confinement. Even when sentencing pursuant to a mandatory minimum sentencing statute, the trial court must still determine whether a state correctional institution or other state institution is appropriate in light of all the surrounding circumstances and factors. 42 Pa. C.S. §9756.

In enacting the mandatory minimum sentencing provisions of 42 Pa. C.S. §9718, the legislature did not specifically exclude the application of the sentencing factors of 42 Pa. C.S. §9756. Similarly, section 9756 contains no provision that it is not applicable when minimum sentencing is mandated. There is no reason to assume that these sections are mutually exclusive.

Furthermore, the legislature's use of the phrase "imprisonment" in section 9718 does not mandate a sentence to a state correctional institution. Imprisonment does not require confinement in a prison. Imprisonment merely means the restraint by lawful authority pursuant to a court order or the detention of

a person contrary to his will. *See, Com v. Jones,* 211 Pa. Super. 366, 236 A.2d 834 (1967); *Com ex rel Dailey v. Myers,* 186 Pa. Super. 176, 142 A.2d 381 (1965).

The common dictionary definition of imprisonment is "(1) act of imprisoning or state of being imprisoned; confinement; restraint; (2) constraint of a person either by force or by such other coercion as restrains him within limits against his will." [9] Since imprisonment does not require confinement in a prison, the trial court must use its discretion pursuant to 42 Pa. C.S. §9756 in determining the appropriate institution when sentencing pursuant to 42 Pa. C.S. §9718.

Appellant submits that the imposition of a minimum five year sentence to a state correctional institution results in the infliction of cruel and unusual punishment in the instant case. Appellant does not contend, however, that the imposition of a mandatory five year minimum sentence for the crimes designated in §9718 is *per se* cruel and unusual punishment.

The appellant's argument is far more restrictive. It is only because of Mr. Wildermuth's age, mental and physical problems and the corresponding lack of facilities at the state correctional institutions to handle these problems, that a five year mandatory sentence to a state correctional institution results in cruel and unusual punishment. In fact, this mandatory five year sentence is a death sentence for Mr. Wildermuth.

The imposition of cruel and unusual punishment against Mr. Wildermuth, however, can be obviated by the application of 42 Pa. C.S. §9756 in the instant matter. That section enables a trial court to determine whether the five year sentence of imprisonment should commence in a state correctional institution or another appropriate institution.

In the instant case, it is confinement in a state correctional institution which results in cruel and unusual punishment. If the trial court had sentenced Mr. Wildermuth to another institution with minimal capability of coping with his physical

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[9] Websters Third New International Dictionary 1137 (1981).

and mental needs, then the legislature's intention could be enforced without a violation of the Eighth Amendment's prohibition against cruel and unusual punishment.

### C. The Pennsylvania Court's Determination That the Dissimilar Treatment of Elderly Offenders Under 42 Pa. C.S. §9717 and 42 Pa. C.S. §9718 Does Not Violate The Equal Protection Clause Decided A Question Of Substance Not Heretofore Determined By This Court

In his appeal to the appellate courts of Pennsylvania, appellant contended that 42 Pa. C.S. §9718 violated his right to equal protection in that the legislature failed to limit §9718's applicability to offenders under sixty years of age. The Superior Court erred in its determination that §9718 did not violate the Equal Protection Clause of the Fourteenth Amendment.

On the same day on which the legislature enacted 42 Pa. C.S. §9718, it also enacted 42 Pa. C.S. §9717. An examination of these two statutes demonstrates that they are virtually identical. Both statutes provide for the same mandatory sentences for the same offenses committed against either elderly persons or minors.

The only difference in these two statutes is the inclusion of an age limit for defendants in §9717. That statute may only be applied against defendants *under* sixty years of age. The statute dictates that considerations of leniency be factored into the sentencing of elderly defendants. If Mr. Wildermuth had pleaded guilty to the same crime, but the victim had been over sixty years of age rather than a minor, the mandatory sentence would not apply. There is no basis in either law or justice to provide protection for elderly offenders in one statute but to deny that protection in a nearly identical statute.

Under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, a state may make distinctions only upon the basis of reasonable classifications. *Eisenstadt v. Baird,* 405 U.S. 438 (1972). Appellant submits that it is not a reasonable classification to treat him differently based on the difference in age of the victim.

The difference in the age of the victim does not have a fair and substantial relation to the age of the offender and the appropriate punishment. Obviously, the legislature was concerned in exposing defendants over sixty years of age to mandatory sentencing acts when it enacted 42 Pa. C.S. §9717. This same concern must be applied when considering 42 Pa. C.S. §9718. The age of the victim does not lessen the concern for the effects of incarceration on the elderly. This omission cannot be the result of a reasonable legislative classification.

In its opinion, the Pennsylvania Superior Court concluded that the omission of the age cap in §9718 was the result of a reasonable legislative classification. (5a). The Court stated that the legislature's intent in enacting §9717 was to protect older citizens rendered vulnerable as a result of their advanced age to certain crimes perpetrated by more youthful offenders. (5a). The Court concluded that the legislative's purpose in enacting §9718 was to protect the vulnerability of individuals under sixteen years of age. (6a). The Court seemed to indicate that in enacting §9717, the legislature was only concerned with the youthful offenders. Whereas, in enacting §9718, the legislature deemed the age of the offender to be irrelevant.

In support of its conclusion that the omission of the age cap in §9718 was reasonable and intentional, the Court stated "Appellant herein is no less a threat to a child than a twenty-five year old person if either is predisposed toward committing one of the offenses provided for in §9718." (6a). Appellant does not contest this. Appellant submits, however, that the same analysis is applicable to §9717. It is equally clear that a sixty-one year old rapist is no less dangerous to a sixty-five year old victim than a fifty-nine year old rapist.

Appellant concedes that the purpose of the legislature in enacting sections 9717 and 9718 was to safeguard the elderly and minors, victims of crime who need special protection. In §9717, however, there was also a clear legislative intent to protect elderly offenders. The age cap in §9717 enables a judge to consider factors of age and infirmity in the sentencing decision. The age cap in §9717 prevents the automatic

imposition of a mandatory minimum sentence for elderly offenders whose physical and mental problems may have attributed to their offenses.

The protection of elderly offenders as well as the protection of elderly and minor victims are reasonable classifications. It is not a reasonable classification, however, to treat Mr. Wildermuth differently based on the age of the victim. The truth is that the legislature neglected to consider the problems of elderly offenders when it enacted 42 Pa. C.S. §9718. Justice cannot permit Mr. Wildermuth to pay for this legislative myopia.

This Court has not considered the constitutionality of either 42 Pa. C.S. §9717 or §9718. In particular, this Court has not addressed the anomalous problem created by the legislature in providing for an age cap in §9717 but neglecting to provide for the same age cap in §9718.

The unreasonable classification created by the difference in these two statutes mandates that this Court reconsider the Pennsylvania Supreme Court's affirmance of the constitutionality of §9718. Without such a review, Mr. Wildermuth and other elderly defendants subject to the mandatory provisions of 42 Pa. C.S. §9718 will be inflicted with punishment far in excess of the punishment inflicted on other elderly offenders convicted of nearly identical offenses.

## CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

DUANE, MORRIS & HECKSCHER

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IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

[J-93 of 1987]

COMMONWEALTH OF PENNSYLVANIA

v.

RICHARD WILDERMUTH,
*Appellant*

NO. 136 E.D. Appeal Dkt. 1986

Appeal from Order of Superior Court entered November 22, 1985, at No. 3333 Philadelphia 1984, Affirming Judgment of Sentence of Court of Common Pleas of Bucks County, Criminal Division, entered December 7, 1984, at Nos. 1224-5 of 1984

347 Pa.Super. 640, 501 A.2d 258 (1985)

Argued: April 9, 1987

ORDER

PER CURIAM April 20, 1987

Appeal dismissed as having been improvidently granted.

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

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**No. 136 E.D. Appeal Docket 1986**

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COMMONWEALTH OF PENNSYLVANIA

v.

RICHARD WILDERMUTH,
*Appellant*

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## JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the appeal having been improvidently granted, the same is hereby dismissed.

BY THE COURT:

MARLENE F. LACHMAN, ESQ.

Marlene F. Lachman, Esq.
Prothonotary

Dated: 4/20/87

IN THE SUPERIOR COURT OF PENNSYLVANIA

**No. 03333 Philadelphia 1984**

COMMONWEALTH OF PENNSYLVANIA

vs.

RICHARD WILDERMUTH,
*Appellant*

**Appeal from the Judgment of Sentence of the Court of Common Pleas of Bucks County, Criminal Division, at Nos. 1224 and 1225 of 1984.**

BEFORE: MONTEMURO, POPOVICH AND WATKINS, JJ.

FILED NOV 22 1985

OPINION BY MONTEMURO, J.:

Appellant, Richard Wildermuth, herein appeals from the judgment of sentence of the Court of Common Pleas of Bucks County. On November 15, 1984, appellant pled guilty to charges of rape, statutory rape, involuntary deviate sexual intercourse, indecent assault and exposure, and corrupting a minor, age 6, and to charges of statutory rape, indecent assault, and corrupting a minor, age 12. Applying the mandatory sentencing provisions of 42 Pa. C.S. §9718 (relating to offenses against infant persons), the court below thereafter sentenced appellant to two concurrent terms of five to ten years imprisonment. This appeal followed the denial of appellant's motion for modification of sentence.

Appellant herein raises a plethora of constitutional challenges to the provisions of section 9718,[1] and to their application to the instant circumstances, which we will address *seriatim.*

Initially, we note that our analysis has been guided by the precepts reiterated in *Commonwealth v. Bannister,* ____ Pa. Super. ____, ____, ____ A.2d ____, ____ (J. 42034/85; filed September 6, 1985; slip opinion at 4):

> Our analysis of the constitutional challenge to this legislation must begin with a strong presumption of constitutionality. *Commonwealth v. Mikulan,* 504 Pa. 244, 470 A.2d 1339 (1983); *Commonwealth v. Cooke,* ____ Pa. Super. ____, 492 A.2d 63 (1985). We will not strike down a statute unless its violation of the Constitution is so clear, palpable and plain as to preclude doubt or hesitation as to its validity. *Snider v. Thornburgh,* 496 Pa. 159, 436 A.2d 593 (1981); *Tosto v. Pennsylvania Nursing Home Loan Agency,* 460 Pa. 1, 331 A.2d 198 (1975); *See also Commonwealth v. Bryant,* 239 Pa. Super. 43, 361 A.2d 350 (1976).

Appellant first argues that section 9718 violates his right to equal protection in that the legislature failed to limit section 9718's applicability to offenders under 60 years of age. Directing our attention to the mandatory sentencing provisions of 42 Pa. C.S. §9717 (relating to offenses against elderly persons), appellant, approximately 80-81 years of age during the period

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[1] §9718. Sentences for offenses against infant persons

(a) Mandatory sentence.—A person convicted of the following offenses when the victim is under 16 years of age shall be sentenced to a mandatory term of imprisonment as follows:

18 Pa. C.S. §2702(a)(1) and (4) (relating to aggravated assault)—not less than two years.

18 Pa. C.S. §3121 (relating to rape)—not less than five years.

18 Pa. C.S. §3123 (relating to involuntary deviate sexual intercourse)—not less than five years.

(b) Eligibility for parole.—Parole shall not be granted until the minimum term of imprisonment has been served.

within which the instant offenses occurred, observes that had his offenses been against persons older than 60, he would not be subject to mandatory sentencing due to the fact that section 9171's applicability is limited to those offenders under 60 years of age. Appellant therefore specifically contends that the unequal treatment of offenders over 60 years of age based upon the ages of their victims cannot pass constitutional muster. We disagree.

Appellant, in his brief, relies upon the standard of review for equal protection challenges set forth in *Moyer v. Phillips,* 462 Pa. 395, 341 A.2d 441 (1975). In *Moyer,* our supreme court noted that it is not permissible for a state to statutorily "treat different classes of persons in different ways"; however, "[t]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike." *Id.* at 401, 341 A.2d 443.[2]

Despite appellant's assertion that the "age cap" included in section 9717 was designed to protect older offenders from mandatory imprisonment, we decline to so interpret the legislature's intent. We view the apparent legislative intent as being to protect older citizens rendered vulnerable as a result of their advanced age to certain crimes perpetrated by more youthful offenders. In its effort to effectuate this legitimate intent, the legislature reasonably classified the group of offenders to which section 9717 would be applied on the basis of their age or relative youthfulness.

In light of the foregoing analysis, it is clear why in fact section 9718 does not include a similar "age cap". In imposing mandatory sentences upon those who commit any of the enumerated offenses against infant persons, the legislature was

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[2] We noted that, although neither appellant nor the Commonwealth makes any further contentions regarding our standard of review, we are of the opinion that a statute which classifies convicted offenders, for the purpose of mandatory sentencing, on the basis of the relative ages of their victims does not involve a "suspect class" or a "fundamental right" warranting the utilization of a more strict standard of judicial review.

similarly concerned with the vulnerability of individuals under 16 years of age. Appellant herein is no less a threat to a child than a 25 year old person if either is predisposed toward committing one of the offenses provided for in section 9718. While section 9718 does indeed omit language rendering its provisions expressly applicable to only those offenders over 16 years of age, we view such a limitation as being implicit, and unnecessary, in that section 9718 could not be applied to an adjudication of delinquency in juvenile court. Furthermore, we note, of course, that the absence or presence of such an express limitation does not impact on the circumstances before us.

Accordingly, we find the instant claim to be meritless.

Appellant's next contention is that section 9718 violates his right to equal treatment in that, unlike 42 Pa. C.S. §9712 (relating to offenses committed with firearms), under section 9718 no mitigating circumstances may be considered. Specifically, appellant alleges that in electing whether to invoke section 9712, "the District Attorney may consider the age of the defendant, the nature of the offense and the effect of incarceration on the defendant to determine the appropriateness of mandatory sentencing." Appellant's brief at 12. However, quite to the contrary, in a recent opinion, this court held that indeed the Commonwealth is utterly without discretion in electing whether or not to apply section 9712. *See Commonwealth v. Anderson,* ____ Pa. Super. ____, ____ A.2d ____ (J. 49027/85; filed September 6, 1985). Since we are unable to discern any other basis for appellant's claim of unequal treatment in this regard, we find the claim to be meritless.

Appellant next argues, in a somewhat vague fashion, that the "arbitrariness" of section 9718 is demonstrated by section 9718's alleged failure to provide for a right of appeal by the Commonwealth. We decline to reach the merits of this claim in that we find that appellant has no standing to present it.

> The question of the constitutionality of a statute cannot generally be determined abstractly but rather is to be determined only as it applies and is sought to be enforced in a particular case before the court. . . .

> [A]nd, furthermore, one who is unharmed by a particular feature of a statute will not be heard to complain of its alleged unconstitutionality.

*Commonwealth v. Bonadio,* 490 Pa. 91, 94 n. 2, 415 A.2d 47, 49 n. 2 (1980); *see also, Banister, supra,* ____ Pa. Super. at ____, ____ A.2d at ____ (slip opinion at 5).

Appellant further posits, "The statute provides for other possibilities of arbitrary and unequal treatment of offenders." In support of this proposition, appellant offers two hypothetical situations and reasserts the claim which we initially addressed and disposed of herein. Regarding appellant's latter reasserted claim, we see no need for repetition. As to the two scenarios fabricated by appellant, neither is relevant to the circumstances presented herein nor does either overbear our necessarily strong presumption of section 9718's constitutionality.

A substantial portion of appellant's brief is devoted to the general contention that the application of section 9718 to the case *sub judice* violates the constitutional prohibitions against cruel and unusual punishments. In so far as appellant's arguments generally maintain that mandatory sentences impermissibly preclude individualized sentencing, we are of the opinion that *Commonwealth v. Wright,* ____Pa.____, 494 A.2d 354 (1985), and its recent progeny, have, at least implicitly, laid those arguments to rest. *See also Commonwealth v. Hernandez,* ____Pa. Super. ____, 488 A.2d 293 (1985).

Additionally, we note that the court below, in its opinion filed on February 14, 1985, cogently observed:

> Insofar as 42 Pa. C.S.A. §9718 is concerned, we do not conclude that the imposition of a mandatory five year minimum prison term is cruel or unusual. The crimes in question here, rape and involuntary deviate sexual intercourse, committed against a minor, are crimes of great severity and the legislature in enacting this statute expressed its grave concern for the protection of minors. Specifically, this act is designed to punish those criminals who prey on the helpless children in our society. Clearly, the nature and severity of the crimes justify the legislature's rationally based minimum sentence.

> In the analysis of the sentence's effect on individual dignity, we also find no constitutional infirmity. As the U.S. Supreme Court stated in *Rhoads v. Chapman,* 452 U.S. 337, 348, 101 Superior (sic) Ct. 2392, ____ L.Ed 2d ____ (1981), 'to the extent that such conditions of confinement are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.' Defendant's assertion that Pennsylvania has 'no prison facility specially (sic) to meet the needs of the aged and infirm,' does not prove that incarceration per se would be cruel and unusual punishment. Certainly, if the defendant required medical treatment it would be available to him, but to conclude that any prison term violates the 8th Amendment is without foundation. We also do not believe that the legislature had any obligation to consider a defendant such as Mr. Wildermuth is establishing a mandatory minimum sentence.

Lower Court opinion at 4-5.

Appellant next alleges that section 9718 is constitutionally infirm in that it denied appellant his right to due process. Contrasting the language of section 9712, appellant argues that section 9718 unconstitutionally fails to (1) provide for the giving of notice of its applicability, (2) indicate during which procedural state its applicability should be established, and (3) designate the standard of proof necessary to determine its applicability. Appellant further asserts that section 9718 is unconstitutionally vague in failing to set forth at what point in time a victim's age is operative for the purpose of invoking the statute's provisions.

In addressing these claims, we rely again upon the well-reasoned opinion of the court below:

> The challenge relative to §9712 (offenses committed with firearms) pertains to the due process requirements of notice and an opportunity to be heard. Defendant asserts that the statute is inadequate in

that the legislature did not specifically state when applicability of the act will be determined and what burden of proof is required to trigger imposition of the mandatory sentence.

At the outset we note that §9712 and §9718 are facially distinguishable in that §9712 requires proof of an additional element beyond conviction of the crime; namely, that the person 'visibly possessed a firearm during the commission of the offense' §9712(a). The provision for applicability of §9712 and the burden of proof under (b) specifically deal with this additional element. Application of §9718 on the contrary is automatic where the defendant is convicted of one of the enumerated crimes against a minor; there is no additional factual element to be proved. Defendant argues that age is a factor to be proved and that the statute is unconstitutionally vague in this requirement. We find no such inadequacy in the statute. The act provides for the mandatory sentence when 'a person [is] convicted of the following offenses when the victim is under 16 years of age.' A logical reading of such language indicates that the victim must be under 16 years of age at the time of commission of the offense. Any alleged errors in the victim's minority status are inappropriately made herein since defendant pled guilty and it was acknowledged that the victims were aged 6 and 12.

Lastly, the defendant asserts that his due process rights were violated in that he did not receive adequate notice of the mandatory penalty to be imposed. We determine this contention to be without merit. Defendant was advised at the time he entered his guilty plea that the mandatory sentence in accordance with §9718 would be imposed, and did not subsequently request that the plea be withdrawn. There is no merit in the argument that a person of reasonable intelligence would not know such conduct

> is prohibited by law. Lack of knowledge concerning possible sentence to be imposed does not constitute a lack of notice violative of due process.

Lower court opinion at 7-8 (footnote omitted). We see no need for further comment regarding these claims.

Appellant's final argument is that section 9718 represents an impermissible interference by the legislature with the sentencing powers of the trial courts. In *Commonwealth v. Cooke,* ____ Pa. Super. ____, 492 A.2d 63 (1985), we were confronted with the identical contention challenging section 9712's constitutionality. We concluded therein that "the creation of mandatory minimum sentences which remove judicial sentencing discretion in non capital cases is not a constitutional violation." *Id.* at ____, 492 A.2d at 70. *See also Wright, supra.* Because we are of the opinion that *Cooke* forecloses appellant's instant claim, we consider it meritless.

Based on the foregoing, we affirm the judgment of sentence.

Judgment of sentence affirmed.

IN THE SUPERIOR COURT OF PENNSYLVANIA

**No. 03333 Philadelphia 1984**

COMMONWEALTH OF PENNSYLVANIA

v.

RICHARD WILDERMUTH,
*Appellant*

## JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Bucks County be, and the same is hereby AFFIRMED.

BY THE COURT:

J. HANIEL HENRY
Prothonotary

Dated: November 22, 1985

COURT OF COMMON PLEAS OF
BUCKS COUNTY—CRIMINAL

Nos. 1224-5/1984

COMMONWEALTH OF PENNSYLVANIA

vs

RICHARD WILDERMUTH

## OPINION

On November 15, 1984, the defendant herein pled guilty to charges of rape, statutory rape, involuntary deviate sexual intercourse, indecent assault and exposure, and corrupting a minor, age 6, and to charges of statutory rape, indecent assault and exposure and corrupting a minor, age 12. In accordance with the provisions of 42 Pa. C.S.A. §9718, defendant was sentenced to serve five to ten years on each charge, concurrently, in a state correctional institution. A motion for sentence reconsideration was denied and an appeal was taken from the sentence of November 15, 1984, as affirmed December 7, 1984.

By way of the motion for sentence reconsideration and the appeal from sentence imposed, defendant seeks to have §9718 found unconstitutional as applied to him and determined to be cruel and unusual punishment contrary to the United States and Pennsylvania Constitutions.[1] The defendant would find the statute infirm in three respects. First, that as applied to this

[1] *U.S. Constitution, Amendment 8*, provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

*Pa. Constit. Article I, §13*, provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted."

defendant, §9718 is cruel and unusual punishment second, that the mandatory sentencing provision does not comport with the due process considerations of notice and adequate procedures; and lastly, that such act is an illegal legislative interference with the sentencing powers of the judiciary. For the reasons discussed herein, we decline to find the statute in question unconstitutional.

At the outset we note that legislative enactments carry a strong presumption of constitutionality. *Snider v. Thornburgh*, 496 Pa. 159, 436 A.2d 593 (1981). Further, the burden of proving unconstitutionality rests squarely on those challenging the enactment, *Tosto v. Pennsylvania Nursing Home Agency*, 460 Pa. 1, 331 A.2d 198 (1975), and all doubts are to be resolved in favor of constitutionality. *Parker v. Children's Hospital of Pennsylvania*, 483 Pa. 106, 394 A.2d 932 (1978). A statute will be declared void and unconstitutional only when such act "clearly, palpably and plainly violates the constitution." *Snider, supra*, 166.

The statute challenged in this proceedings states:

> §9718 Sentences for offenses against infant persons
>
> (a) *Mandatory Sentence.*—A person convicted of the following offenses when the victim is under 16 years of age shall be sentenced to a mandatory term of imprisonment as follows:
>
> • • •
>
> 18 Pa. C.S. §3121 (relating to rape) but less than five years.
>
> 18 Pa. C.S. §3123 (relating to involuntary deviate sexual intercourse) not less than five years.
>
> [1982, Dec. 30, P.L. 1472, No. 334, §1, in 60 days.]

The defendant challenges the statute only in its application to his circumstances, not in general as being grossly disproportionate to the severity of the crimes. Such a contention is based on defendant's age and physical and mental conditions.[2]

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[2] Mr. Wildermuth is age 81 and suffers from organic brain deterioration and coronary dysfunction.

The eighth amendment prohibition against cruel and unusual punishment has been interpreted by the federal courts to require assessment of the punishment imposed in terms of effects on individual dignity. The nature and quality of the offense, the legislative purpose of the punishment and comparison of punishments in other jurisdictions for similar crimes and within the jurisdiction for other related offenses. *Jackson v. Bishop,* 404 F.2d 571 (8th Cir. 1968); *Hart v. Coiner,* 483 F.2d 136 (1973). Most of the case law dealing with cruel and unusual punishment relates to the imposition of the death penalty and the harshness of imposing life sentences under recidivist statutes.

Insofar as 42 Pa. C.S.A. §9718 is concerned, we do not conclude that the imposition of a mandatory five year minimum prison term is cruel or unusual. The crimes in question here, rape and involuntary deviate sexual intercourse, committed against a minor, are crimes of great severity and the legislature in enacting this statute expressed its grave concern for the protection of minors. Specifically, this act is designed to punish those criminals who prey on the helpless children in our society. Clearly, the nature and severity of the crimes justify the legislature's rationally based minimum sentence.

In the analysis of the sentence's effect on individual dignity, we also find no constitutional infirmity. As the U.S. Supreme Court stated in *Rhoads v. Chapman,* 452 U.S. 337, 348, 101 Superior Ct. 2392, ____ L.Ed 2d ____ (1981), "to the extent that such conditions of confinement are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society." Defendant's assertion that Pennsylvania has "no prison facility specially [sic] to meet the needs of the aged and infirm," does not prove that incarceration per se would be cruel and unusual punishment. Certainly, if the defendant required medical treatment it would be available to him, but to conclude that any prison term violates the 8th Amendment is without foundation. We also do not believe that the legislature had an obligation to consider a defendant such as Mr. Wildermuth in establishing a mandatory minimum sentence.

The argument that imposition of §9718 precludes consideration of mitigating factors goes directly to the legislature's right to classify crimes. As the Superior Court noted in *Commonwealth ex rel. Lycett v. Ashe,* 145 Pa. Superior Ct. 26, 20 A.2d 881 (1941):

> The legislature has the right to classify crimes, and designate the procedure at trial or after sentence; it may fix the maximum penalty and likewise can, if it sees fit, name the minimum. The necessity or wisdom of its action is a question for its determination, and in so doing it does not violate Article V, Section 1 of the Constitution vesting the judicial power in the courts . . . [cites omitted]. *Commonwealth ex rel. Lycett,* 29.

In the enactment of §9718, the legislature has concluded that there are no mitigating circumstances relating to crimes against minors for 18 Pa. C.S. §3121 and §3123 which warrant a lesser sentence than five years. Inasmuch as we are able to conclude that the legislature had a rational basis for enacting this statute and that no constitutional precepts are violated by the enactment, we find no illegal encroachment of the judiciary by the legislature. Consideration of mitigating factors will apply in determining whether sentences for related crimes will be served concurrently or consecutively, and in determining parole availability once the minimum term is served.

Defendant also challenges the statute's validity in comparison to two other mandatory sentencing provisions: 42 Pa. C.S.A. §9712 and §9717. Section 9717 pertains to crimes against the elderly and imposes mandatory sentences for convictions under 18 Pa. C.S. §3121 and §3123 (also 18 Pa. C.S. §2702(a)(1) and (4) and 18 Pa. C.S. §3922). Defendant finds an equal protection argument in that §9717 applies to persons under 60, whereas §9718 does not utilize an age limit. We do not conclude that the age "differential" in these mandatory sentencing provisions violates equal protection. Each statute is targeted to protect a different group of people and solely because §9717 distinguishes between defendants aged 59 and 61 does not give this defendant standing to

challenge §9718 on an equal protection ground. The legislature's purpose in creating this divergence relates to the groups of people to be protected not, as defendant asserts, in concern with exposing criminals over 60 to mandatory sentences.

The challenge relative to §9712 (offenses committed with firearms) pertains to the due process requirements of notice and an opportunity to be heard. Defendant asserts that the statute is inadequate in that the legislature did not specifically state when applicability of the act will be determined and what burden of proof is required to trigger imposition of the mandatory sentence.

At the outset we note that §9712 and §9718 are facially distinguishable in that §9712 requires proof of an additional element beyond conviction of the crime; namely, that the person "visibly possessed a firearm during the commission of the offense" §9712(a). The provision for applicability of §9712 and the burden of proof under (b) specifically deal with this additional element. Application of §9718 on the contrary is automatic where the defendant is convicted of one of the enumerated crimes against a minor; there is no additional factual element to be proved. Defendant argues that age is a factor to be proved and that the statute is unconstitutionally vague in this requirement. We find no such inadequacy in the statute. The act provides for the mandatory sentence when "a person convicted of the following offenses when the victim is under 16 years of age." A logical reading of such language indicates that the victim must be under 16 years of age at the time of commission of the offense. Any alleged errors in the victim's minority status are inappropriately made herein since defendant pled guilty and it was acknowledged that the victims were aged 6 and 12.

Lastly, the defendant asserts that his due process rights were violated in that he did not receive adequate notice of the mandatory penalty to be imposed. We determine this contention to be without merit. Defendant was advised at the time he entered his guilty plea [3] that the mandatory sentence in

[3] Defendant was also advised of the mandatory sentence under §9718 in a prior guilty plea hearing before President Judge Isaac S. Garb on 6/18/84. The earlier plea was withdrawn 9/10/84.

accordance with §9718 would be imposed, and did not subsequently request that the plea be withdrawn. There is no merit in the argument that a person of reasonable intelligence would not know such conduct is prohibited by law. Lack of knowledge concerning possible sentence to be imposed does not constitute a lack of notice violative of due process.

We find no constitutional infirmity in the imposition of a mandatory sentence, in accordance with 42 Pa. C.S.A. §9718, to this defendant.

BY THE COURT:

_____

J.

DATE: February 14, 1985

IN THE COURT OF COMMON PLEAS OF
BUCKS COUNTY—CRIMINAL

Nos. 1224, 1225/84

COMMONWEALTH OF PENNSYLVANIA

vs.

RICHARD WILDERMUTH

## ORDER

AND NOW, to wit, this 7th day of December, 1984, upon consideration of defendant's motion for sentence modification, it is hereby ordered and decreed that said motion is denied. The sentence imposed November 15, 1984 is hereby reinstated.

BY THE COURT:

William Hart Rufe, III

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 136 E.D. APPEAL DKT 1986

COMMONWEALTH OF PENNSYLVANIA

v.

RICHARD WILDERMUTH,
*Appellant.*

## NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Richard Wildermuth, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Pennsylvania, affirming judgment of Sentence of the Court of Common Pleas of Bucks County, Criminal Division, entered December 7, 1984 at Nos. 1224-5 of 1984.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

DUANE, MORRIS & HECKSCHER
1500 One Franklin Plaza
Philadelphia, PA 19102
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Ronald F. Kidd
Michael M. Mustokoff
Teresa N. Cavenagh
*Counsel for Appellant*
Richard Wildermuth

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

NO. 136 E.D. APPEAL DKT 1986

COMMONWEALTH OF PENNSYLVANIA

v.

RICHARD WILDERMUTH,
*Appellant.*

## PROOF OF SERVICE

I hereby certify that the foregoing Notice of Appeal has been served by first class mail this 29th day of April, 1987 upon the following:

Alan M. Rubenstein, District Attorney
District Attorneys' Office
Bucks County Courthouse
Doylestown, PA 18901

DUANE, MORRIS & HECKSCHER

By:_____

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*Attorneys for Appellant*
Richard Wildermuth

RICHARD J. IEVOLI, Ph.D.
Licensed Clinical Psychologist
137 Montgomery Ave.
Bala Cynwyd, PA 19004

November 12, 1984

Mr. Michael Mustokoff, Esquire
One Franklin Plaza
Philadelphia, PA.

Dear Mr. Mustokoff,

Attached, please find my report on your client, Mr. Richard Wildermuth. In my opinion, this client is in acute emotional distress and therapeutic intervention is indicated.

You also asked my opinion as to Mr. Wildermuth's ability to make a rational decision at the time of his arrest. As my report will indicate, my assessment of the client indicates a clear deterioration in his functioning since March. In the absence of sufficient data, I cannot comment on his mental condition at the time of his arrest. However, based on his current psychological state, I think it highly unlikely that he could bear up very well under that kind of stress were the arrest to take place today. For amplification, please refer to that section of my report, on page three,which discusses the possibility of a diminished ability to fully appreciate the consequences of his actions when faced with the need for immediate tension reduction.

Thank you for the opportunity to evaluate this interesting client. If you require further information or larification, please do not hesitate to contact me.

Sincerely yours,

RICHARD J. IEVOLI, Ph.D.
Director, Bala Psychological
Associates

BALA PSYCHOLOGICAL ASSOCIATES
137 Montgomery Avenue
Bala Cynwyd, PA 19004
Telephone (215) 664-2455

## PSYCHOLOGICAL EVALUATION

| | |
|---|---|
| NAME: | Richard Wildermuth |
| SEX: | Male |
| BIRTHDATE: | 2/2/03 |
| AGE: | 81 |
| TEST DATE: | 10/28/84 |
| EXAMINER: | Richard J. Ievoli, Ph.D. |

## TESTS ADMINISTERED

Figure Drawings
Bender-Gestalt Visual Motor Test, With Memory
Rorschach Inkblots
Thematic Apperception Test
Minnesota Multiphasic Personality Inventory
Incomplete Sentences Blank
Wechsler Proverbs and Similarities
Clinical Interview

## BEHAVORAL OBSERVATIONS

Mr. Wildermuth is an 81 year old married white male who arrived for testing accompanied by his wife and daughter. His attitude was very compliant and even somewhat apologetic. He seemed eager to cooperate, and twice refused rest breaks during the long testing session. He was oriented in the three spheres, and exhibited no psychotic symptoms. Mood and affect, though dysphoric, were appropriate to ideation. No serious gross motor difficulties were observed. Speech patterns were unremarkable, except for a noticeable German accent. Dress and hygeine were appropriate. If permitted to speak at length, Mr. Wildermuth showed a strong propensity to talk about current legal difficulties and past life's hardships. Following testing, he appeared emotionally drained, but otherwise manifested no excessive fatigue or other ill effects.

## PSYCHOSOCIAL HISTORY

Mr. Wildermuth is a retired florist who was born in Germany in 1903, immigrating to the United States at the age of 27. He has been married to the same woman for 52 years. The couple lived in Warminster, PA. for 14 years; following his arrest, they now reside with his daughter in King of Prussia.

Mr. Wildermuth was able to recall a childhood marred by extreme physical abuse at the hands of an alcoholic stepfather. AT one point, his mother found it necessary for he and his brothers to live outside the home for a significant period of time. He has no history of prior psychiatric complaints or treatment, or of problems with the law. Mr. Wildermuth denies anything more than occasional use of alcohol. His daughter's description of her father is of a "self-contained" individual, who does not show emotion and never cries. From her own childhood, she recalled that her father never struck his children or raised his voice to them. She has not noticed any recent, marked changes in his personality. She specifically denied seeing evidence of clouded consciousness, wandering off, poor hygeine or emotional lability. She did report significant apathy, episodes of apparent dissociation, and impaired memory for recent events, all since his arrest.

## TEST RESULTS AND INTERPRETATIONS

A clinical interview produced complaints of loss of memory and severe sleep disturbance. Mr. Wildermuth reported that he often takes wrong turns while driving familiar routes, and is unable to recall recent events. He variously described the experience of his memory loss as "a light going out" or "my mind flies away". When attempting sleep, he is troubled by a humming sound in his ears, anxiety and obsessive rumination. He reported being unable to sleep for more than a few hours at a time, and early morning awakening is common.

Testing results tended to confirm complaints of memory impairment and additionally suggested deficits in abstract thinking ability. Mr. Wildermuth was unable to offer more than literal, concrete interpretations of proverbs. For example, "Strike while the iron is hot" was interpreted as "The black-

smith needs the iron to be hot when he strikes it." In no instance was there any appreciation of the statement as being a proverb. Impaired abstract thinking ability was also suggested when the patient was asked to judge similarities between 14 pairs of items, such as orange-banana, and coat-suit. All responses were concrete, with only two marginally adequate. Even taking into account normal age-related deficits, Mr. Wildermuth's performance indicates clear impairment. Moreover, his functioning in this area can be seen to have deteriorated considerably since similar testing was performed in March of this year.

Projective and objective personality testing likewise indicated a significant deterioration in functioning. Mr. Wildermuth produced an MMPI profile in which 8 scales, including the F scale, were above the 70th percentile. This profile differs from the MMPI profile produced in March, when only two scales were above the 70th percentile. This change suggests that Mr. Wildermuth is now frankly admitting to psychiatric symptomatology serious enough to warrant concern. As in March, Mr. Wildermuth manifests significant depressive features, including obsessive worry, severely low self-esteem and social withdrawal. He is listless, tense, intropunitive and exhibits numbing of responsiveness to the environment. Energy level is quite low. He lacks drive, and his outlook is pessimistic. Further, the patient feels isolated and alienated, and harbors fundamental and disturbing questions about his own identity and worth. There may be transient suicidal ideation as well.

Aside from his depression, which is consistent across the board, Mr. Wildermuth's current psychological functioning suggests diminished ability to cope. Indications are that his premorbid personality was marked by extreme rigidity and insistent repressive defenses. Characteristically, he is rather guarded and controlled regarding his deepest feelings and impulses. There are indications of a rigidly conventional value system characterized by perfectionism, lack of insight and a strong need to cast himself in a favorable light. A combination of conscious control and repressive defenses have represented his primary ego functions. Presently, there are indications of a serious failure of these repressive defenses under stress. Think-

ing is becoming confused; while associations are not loose, there is diminished ability to concentrate, possibly due, in part, to the intrusion of circumstantial thoughts and irrelevant ideation. Mr. Wildermuth may also be experiencing a deficit in his ability to plan ahead and fully appreciate the consequences of his actions. In agitated states, his social judgement may prove unreliable. His actions may be dictated by the more immediately pressing need of tension reduction, rather than long term effects. At this time, Mr. Wildermuth is experiencing considerable distress. He is anxious, self-devaluating and feels alienated and resentful. His frank admission of psychiatric symptoms may represent a cry for help based on severe inner turmoil.

## SUMMARY AND RECOMMENDATIONS

Mr. Wildermuth's clear deterioration in a number of cognitive and psychological areas of functioning warrants concern. Presently, it is difficult to determine whether any or all of these changes can reliably be attributed to the primary and secondary effects of age-related organic dysfunction, the effects of severe situational stress, or a combination of both. Regarding possible insidious organic deterioration, it is strongly recommended that Mr. Wildermuth be retested in 6 month's time to determine whether further impairment has occurred. Of more immediate concern, however, is his serious depression and inner turmoil. He is clearly in need of, and would probably benefit from, a period of supportive psychotherapy. This treatment would also serve the purpose of a more in-depth assessment of acute symptomatology. Such treatment remains indicated regardless of sentencing considerations. It should also be noted that, given his present mental state, an extended period of incarceration would likely have devastating psychological effects.

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Richard J. Ievoli, Ph.D.
PA Lic. No. PS004045-L

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TUrner 7-6668

September 20, 1984

Dr. Leonard Winegrad
64 Easton Road
Willow Grove, PA 19090

re: Richard Wildermuth

Dear Dr. Winegrad:

On September 18, 1984, I saw Mr. Richard Wildermuth in the office for cardiac evaluation. As you know, Mr. Wildermuth is an 81 year old gentleman with no past history of chest pain or myocardial infarction. He has generally been healthy in the past except for history of recurrent pneumonia. He has, however been without pneumonia since 1980.

Three days prior to his visit, he had an episode of substernal chest pain associated with lightheadedness that occurred at rest in bed. This lasted almost a minute, and recurred times two. Since then, he had had very transient similar episodes that have resolved spontaneously. He denies any exertional chest pressure, although he does note shortness of breath on exertion, with tachycardia.

Cardiac risk factors include a history of mild hypertension, and a history of cigarette smoking, although he quit 16 years ago. Medications include only sorbitrate 5 mg q.i.d., which was started the day before his visit to see me.

Physical examination revealed a blood pressure of 175/85 in the left arm and 180/80 in the right arm. Pulse was 80 and regular. Neck was without jugular venous distention or carotid bruits. Thyroid was normal. Chest was clear. Cardiac examination revealed a normal point of maximum impulse. S1 and S2 were normal with a wide by physiologic splitting of S2. There is a grade II/VI systolic murmur at the lower left sternal

border that decreased with Valsalva. There is a grade I/VI diastolic blow at the apex heard in the left lateral position. Abdomen was benign. Extremities were normal without edema.

Electrocardiogram revealed normal sinus rhythm with first degree AV block. Right bundle branch block was present. There were mild nonspecific ST-T changes in the anterior precordial leads.

Mr. Wildermuth gives a history of chest pain that is not typical of angina, but certainly could represent cardiac ischemia. I certainly doubt that he has had a myocardial infarction. He has heart murmurs on physical examination that suggest mild aortic valve disease, but certainly there is no evidence of critical aortic stenosis.

For further workup, I have scheduled him for an exercise thallium test, as well as a cardiac echo to assess hiss valve anatomy. I have recommended that he continue on the sorbitrate along with sublingual nitroglycerin which he can take if the chest pain recurs. He will return to see me in three weeks, and I will get back to you with the results of these tests.

Thank you very much for allowing me to see this interesting patient.

Sincerely,

WILLIAM K. LEVY, M.D.

THE HORSHAM CLINIC

May 3, 1984

Michael Mustokoff, Esq.
1500 1 Franklin Plaza
Philadelphia, Pa. 19102

RE: Richard Wildermuth

Dear Mr. Mustokoff:

Mr. Wildermuth was referred to Horsham Clinic, Inc. for psychiatric hospitalization, evaluation and treatment following two reported incidents which caused him considerable depression associated with anxiety. He was admitted to Horsham Clinic, Inc. on 3-1-84 and discharged on 4-6-84, with a recommendation to continue with supportive psychiatric treatment. Appointments have been scheduled and the patient will be monitored psychiatrically for the next year on a regular basis. An in-depth re-evaluation will be made at the end of the year.

During the course of his hospitalization, he had a complete and comprehensive physical examination, laboratory testings, such as, blood chemistry, urinalysis, electrocardiogram, chest x-ray, CAT Scan, psychological testing and intensive psychosocial history. He was also engaged in intensive psychiatric evaluation sessions reviewing past and present alleged incidents and the impact on his present state of feelings.

At the time of hospitalization, he was found to be alert, oriented to all three spheres. There was no evidence of psychosis or thought disorders, no evidence of hallucinations. He denied any wrong doing, stating that he was not engaged in what he has been accused of. He gave some history of childhood experiences which were non-contributory and not significant. He has a stable marriage. He is an honorable citizen, lived in a community and worked his entire life. He developed respect and recognition which were all verified. His behavior through out the length of his hospitalization and through extensive and repeated sessions and evaluation were

observed very closely and were all inconsistent with the charges. He showed no prior history or psychiatric illness or treatment. He certainly does not appear to be an individual with anti-social behavior.

In summary, it is my professional opinion that the alleged incident did not occur. Considering this gentlemans' overall mental status and the impact of the accusation, although traumatic to him, relocating from his present neighborhood and with follow up psychiatric treatment, may be assuring to the community.

If I can be of further assistance, please feel free to contact me.

Respectfully,

BIJAN ETEMAD, M.D.
Director
Older Adult Services

87-860

No.

Supreme Court, U.S.
FILED
AUG 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The

# Supreme Court of the United States

October Term, 1987

RICHARD WILDERMUTH,

*Appellant,*

*vs.*

COMMONWEALTH OF PENNSYLVANIA,

*Appellee.*

*On Appeal from the Supreme Court of Pennsylvania*

## MOTION TO DISMISS OR AFFIRM

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## COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Whether an elderly perpetrator, convicted of numerous sexual offenses against infants and sentenced under a mandatory sentencing statute, can be imprisoned where medical care is provided, without violating the prohibition against cruel and unusual punishment?

2. Whether the mandatory sentencing statute codified at 42 Pa.C.S.A. § 9718 is a rational exercise of legislative power where, in classifying serious sexual crimes against infants, there are no mitigating circumstances which warrant a sentence of less than five years imprisonment?

3. Whether there is a substantial federal question that warrants further argument where the Pennsylvania courts below properly held based upon state law that appellant's rights to equal protection were not violated since the state legislature made a reasonable classification in enacting 42 Pa.C.S.A. § 9718 that persons who commit certain sexual offenses against infants must serve a mandatory five year minimum sentence?

No.

In The

# Supreme Court of the United States

October Term, 1987

RICHARD WILDERMUTH,

*Appellant,*

*vs.*

COMMONWEALTH OF PENNSYLVANIA,

*Appellee.*

*On Appeal from the Supreme Court of Pennsylvania*

## MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to Rule 16, moves the Court to dismiss the appeal herein, or in the alternative, affirm the judgment of the Supreme Court of Pennsylvania which dismissed the appellant's appeal as improvidently granted, thereby affirming the lower court's judgment of sentence, since it is manifest that the questions at issue are so insubstantial as to not warrant further argument.

## STATEMENT OF THE CASE

On November 15, 1984, appellant Richard Wildermuth, pleaded guilty to the following charges in which his victim was Melissa Cuikla, a six year-old girl: rape, 18 Pa.C.S.A. § 3121; statutory rape, 18 Pa.C.S.A. § 3122; involuntary deviate sexual intercourse, 18 Pa.C.S.A. § 3123; indecent assault, 18 Pa.C.S.A. § 3126; indecent exposure, 18 Pa.C.S.A. § 3127; and, corrupting a minor, 18 Pa.C.S.A. § 6301. At the same time, appellant pleaded guilty to the following charges in which his victim was Julia Green, a mentally retarded twelve year-old: statutory rape, 18 Pa.C.S.A. § 3122; indecent assault, 18 Pa.C.S.A. § 3126; indecent exposure, 18 Pa.C.S.A. § 3127; and, corrupting a minor, 18 Pa.C.S.A. § 6301.

In its pre-sentence investigation report, the Bucks County Adult Probation and Parole Department recommended that appellant be sentenced to five to ten years incarceration at the State Correctional Institution. This recommendation was made in light of the mandatory sentencing provisions which state that appellant must be sentenced to a mandatory five year minimum sentence, and could be sentenced to mandatory five year minimum sentences for each act of rape and involuntary deviate sexual intercourse against his infant victims.

Taking into account the mandatory sentencing provisions of 42 Pa.C.S.A. § 9718, the Honorable William Hart Rufe, III, of the Court of Common Pleas of Bucks County, sentenced appellant to two concurrent terms of five to ten years imprisonment in a state institution.

Appellant filed for modification of his sentence on the grounds that the mandatory minimum sentencing provision of 42 Pa.C.S.A. § 9718 as applied to him is cruel and unusual punishment and therefore violates the Eighth and Fourteenth

Amendments of the Constitution of the United States. By order dated December 7, 1984, Judge Rufe denied this motion and stated the reasons for doing so in an opinion filed February 14, 1985. Judge Rufe, after considering the nature and severity of the crimes at issue and the presumption of constitutionality that adheres to legislative enactments, stated that the imposition of a mandatory five year minimum prison term upon appellant is not cruel or unusual punishment:

> The crimes in question here, rape and involuntary deviate sexual intercourse, committed against [two] minor[s], are crimes of great severity and the legislature in enacting this statute expressed its grave concern for the protection of minors. Specifically, this act, is designed to punish those criminals who prey on the helpless children in our society.

Appellant's Brief at 14a.

Therefore, as Judge Rufe concluded, the "nature and severity of the crimes justify the legislature's rationally based minimum sentence." *Id.*

On December 12, 1984, following the denial of appellant's motion for modification of sentence, appellant appealed to the Superior Court of Pennsylvania. Appellant raised a plethora of constitutional challenges to 42 Pa.C.S.A. § 9718. The Superior Court found all appellant's claims to be meritless, upheld the constitutionality of Section 9718, and affirmed the lower court's judgment of sentence. Judge Frank Montemuro, writing for the Superior Court, stated that a statute will not be struck down unless its violation of the Constitution is so clear, palpable and plain as to preclude doubt or hesitation as to its validity (Appellant's Brief at 4a). Moreover, the court held that incarceration per se

is not cruel and unusual punishment and the appellant's assertion that his prison term violates the Eighth Amendment is without foundation. *Id.* at 8a.

On December 19, 1985, appellant petitioned the Supreme Court of Pennsylvania for allowance of appeal. At first, the Supreme Court of Pennsylvania granted the appeal, but on April 20, 1987, after full briefing and oral argument, the court dismissed the appeal as improvidently granted.

On April 27, 1987, upon consideration of the Supreme Court of Pennsylvania's order of April 20, 1987 which dismissed appellant's appeal as improvidently granted, Judge Rufe ordered the appellant to be taken into custody and transported to the State Correctional Institution at Graterford where he was to begin to serve his sentence. Only three days later, appellant filed this appeal to the Supreme Court of the United States. Upon notification of appellant's appeal to the Supreme Court of the United States, from the order of the Supreme Court of Pennsylvania issued on April 20, 1987, Judge Rufe rescinded his order of April 27, 1987, thereby staying the sentence of appellant pending this appeal. As of this writing, appellant is not in custody and has not served one day of his sentence which was imposed November 15, 1984.

## THE QUESTION IS NOT SUBSTANTIAL

### I.

**This Court has previously addressed the constitutionality of mandatory minimum sentences in *McMillan v. Pennsylvania*, ____ U.S. ____, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986). This Court has also held that conditions of confinement are not cruel and unusual punishment per se. *Rhoads v. Chapman*, 452 U.S. 337 (1981). Thus, where appellant argues that a mandatory term of incarceration is cruel and unusual because he is elderly, no substantial federal issue has been presented which has not been addressed heretofore.**

This Court has recently affirmed Pennsylvania's legislative power to enact mandatory minimum sentences. *McMillan v. Pennsylvania*, ____ U.S. ____, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986).

Mandatory minimum sentences are not cruel and unusual or unusually severe per se, *People v. Bullock*, 362 N.Y.S. 2d 682, 80 Misc. 2d 73 (1974), and mandatory minimum sentences may serve a substantial state interest. *Francioni v. Wainwright*, 650 F. 2d 590 (C.A. Fla. 1981). Such is the case with 42 Pa.C.S.A. § 9718, sentences for offenses against infant persons.

The particular factor made relevant by the statute, the age of the victim, has historically been considered to make an offense more serious and the punishment more severe. However, the mandatory five-year sentence does not increase the sentence required by statute or eliminate proof beyond a reasonable doubt for any element necessary for conviction. *Commonwealth v. Arnold*, 514 A. 2d 890 (Pa. Super. 1986). Age of the victim is a reasonable consideration for lawmakers. Pennsylvania has a substantial state interest in deterring crimes and protecting children in the Commonwealth.

Appellant argues that Pa.C.S.A. § 9718 is cruel and unusual as applied to him because he is elderly and has illnesses associated with aging. He argues that Pennsylvania's prison system is "ill-equipped" in having no specialized facility to treat organic brain syndrome. As appellant also suffers coronary dysfunction, he argues that his sentence is cruel and unusual punishment and "nothing less than a death sentence." (Appellant's Brief at 8). The Commonwealth disagrees with appellant's characterization of cruel and unusual punishment.

Since *Rhoads v. Chapman*, 452 U.S. 337 (1981), this Court has held that to the extent that such conditions of confinement are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society. *Id.* at 348.

Conditions of confinement are not cruel and unusual per se even where the prisoner is elderly. In a society where longevity has substantially increased in only a few decades, accepting appellant's argument would leave a huge segment of the population free to commit crime with impunity.

The Commonwealth argues that appellant's case can be likened to *State v. Trippiedi*, 499 A. 2d 239 (N.J. Super. A.D. 1985). In *Trippiedi* the defendant was sentenced under the Graves Act [N.J.S.A. 2C:43-6, subd. c], imposing a three-year period of parole ineligibility. Even though the defendant Trippiedi suffered from coronary artery disease, he was not subject to cruel and unusual punishment because medical care was available in the prison facilities. Likewise, appellant Wildermuth would have medical care available to him in prison.

While appellant argues that five years in prison would be tantamount to a death sentence, his physical condition could deteriorate in prison or at home. As the court noted in *Trippiedi*, it is even possible that treatment would be available faster in the prison. *Id.* at 241.

Appellant has not as yet been incarcerated. Nor has he alleged or proven gross deficiencies which would present a grave and immediate danger to him if incarcerated pursuant to his sentence. Therefore, appellant Wildermuth has not presented a cognizable Eighth Amendment claim.

## II.

**The Pennsylvania courts' decision that 42 Pa.C.S.A. § 9718 is not controlled by 42 Pa.C.S.A. § 9756 does not result in cruel and unusual punishment and as a state court interpretation of state law does not present a substantial federal question.**

The Pennsylvania courts concluded that the legislature had a rational basis for enacting § 9718 and a right to classify those crimes as having no mitigation which warrants a sentence of less than five years (Trial Court Opinion at 15a). The statute mandates a term of *imprisonment* upon conviction and limits judicial discretion to some extent. However, the court was not limited in considering mitigating circumstances in sentencing the related crimes concurrently. Therefore, appellant's argument that the court was completely precluded from considering mitigating circumstances is in error.

Appellant argues that the sentencing court did not consider confinement other than imprisonment and that because of this, appellant has necessarily been subjected to cruel and unusual punishment. In support of this contention, appellant cites 42 Pa.C.S.A. § 9756. Appellant contends that 42 Pa.C.S.A. § 9756 mandates the consideration of alternative methods of confinement. Appellant implies that § 9756 supersedes a newer law which clearly specifies imprisonment. This logic is erroneous.

The general sentencing statute, 42 Pa.C.S.A. § 9756, serves important notice and record functions. It requires the sentencing

court to specify any maximum sentence authorized as well as specifying where the sentence shall be served when imposing a sentence of confinement.

The Commonwealth maintains that 42 Pa.C.S.A. § 9718 serves a different purpose and operates in a manner separate and distinct from 42 Pa.C.S.A. § 9756. One statute addresses sentencing procedures generally while the other mandates the sentence to be imposed. The court has no discretion as to whether or not to impose a sentence of confinement or where the sentence shall be served because 42 Pa.C.S.A. § 9718 mandates imprisonment upon conviction of certain crimes. Therefore, the general sentencing statute is completely inapplicable where the sentencing court is addressing convictions subject to 42 Pa.C.S.A. § 9718.

While the lower courts did not specifically address the relationship between 42 Pa.C.S.A. § 9756 and 42 Pa.C.S.A. § 9718, the Pennsylvania Supreme Court allowed oral argument on this issue but later dismissed the appeal as having been improvidently granted.

Because § 9756 does not apply to § 9718 appellant argues he is subjected to cruel and unusual punishment. As such, appellant simply reiterates that a mandatory sentencing statute creates cruel and unusual punishment. Whether a mandatory sentence of imprisonment is cruel and unusual per se has been addressed and subsumed in Question Presented 1 *supra*.

## III.

**The question of whether 42 Pa.C.S.A. § 9718 as applied to appellant violates the Equal Protection Clause of the Constitution was properly decided by the Pennsylvania courts below and does not involve a substantial federal question that warrants further argument.**

The Superior Court of Pennsylvania and the Court of Common Pleas of Bucks County, Pennsylvania properly held that the Pennsylvania legislature did not violate the appellant's constitutional right to equal protection under the law. Therefore, the Supreme Court of Pennsylvania correctly dismissed appellant's appeal as improvidently granted.

The basic principles governing application of the Equal Protection Clause of the Fourteenth Amendment are familiar and well-settled. As explained in *Reed v. Reed,* 404 U.S. 71 (1971):

> In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. *Barbier v. Connolly,* 113 U.S. 27 (1885); *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61 (1911); *Railway Express Agency v. New York,* 336 U.S. 106 (1949); *McDonald v. Board of Election Commissioners,* 394 U.S. 802 (1969). The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification must be reasonable, not arbitrary, and must rest upon some ground of difference

> having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. *Royster Guano Co. v. Virginia,* 253 U.S. 412 (1926); *Eisenstedt v. Baird,* 405 U.S. 441 (1972).

The standard of review for equal protection challenges has been equally well-settled in Pennsylvania since *Moyer v. Phillips,* 462 Pa. 395, 341 A. 2d 441 (1975). In fact, the standard is almost exactly the same as Supreme Court's mandate:

> [t]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike. *Id.* at 401, 341 A. 2d 443; *Commonwealth v. Wildermuth,* 501 A. 2d 258, 260 (Pa. Superior 1985).

In the instant case, the Pennsylvania courts' determination that 42 Pa.C.S.A. § 9718 does not violate appellant's right to equal protection properly followed the standards stated above, and rests upon adequate non-federal grounds. Therefore, no substantial federal question exists that warrants further argument.

Appellant alleges that § 9718 violates his right to equal protection in that the legislature failed to limit § 9718's applicability to offenders under sixty (60) years of age (Appellant's Brief at 13). Appellant would ask this Court to look at the mandatory sentencing provisions of 42 Pa.C.S.A. § 9717 (relating to offenses against elderly persons). He argues that § 9717 and § 9718 are almost identical except that § 9717 has an "age cap" in that the mandatory sentence of that section can only be applied to offenders under 60 years of age. *Id.* Appellant manufactures

an equal protection argument by contending that if his victims had been over 60 years old the mandatory sentence would not apply. The fault in appellant's contention is that the victims of his sexual offenses were not over 60 years old, but were only 6 and 12 years of age. Therefore, the provisions of § 9718, and not § 9717, apply to him.

The Pennsylvania state legislature, through § 9718, has expressed its outrage for sexual offenses, *i.e.*, rape or involuntary deviate sexual intercourse, committed against infants. It goes without citation that there is no denial of equal protection for a state legislature to impose a stricter sentence for some crimes than for others.

Although the mandatory sentencing provisions of § 9717 does not apply to him, appellant boldly asserts that the "age cap" included in § 9717 was designed to protect older offenders from mandatory imprisonment. Appellant submits that the legislature was "myopic" in not putting this purpose into § 9718 (Appellant's Brief at 15).

Appellant does not properly read § 9717. The purpose of § 9717 is not to protect elderly offenders from mandatory sentencing, but to sentence relatively youthful offenders to mandatory sentences for crimes committed *against* elderly persons. *Commonwealth v. Wildermuth,* 501 A. 2d 258, 260 (1985).

As the Superior Court stated:

> [w]e view the apparent legislative intent [of Section 9717] as being to protect older citizens rendered vulnerable as a result of their advanced age to certain crimes perpetuated by more youthful offenders.

*Wildermuth, supra* at 260.

In its efforts to effectuate the legitimate intent of protecting the elderly from youthful offenders, the legislature reasonably classified the group of offenders to which § 9717 would be applied on the basis of their age and relative youthfulness to their victims. The classifications of § 9717 and § 9718 are not arbitrary or capricious, but reasonable and the classification "rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike," *Moyer, supra* at 401, 341 A. 2d at 443. Therefore, there is no equal protection violation.

Furthermore, the Pennsylvania lower courts in deciding appellant's equal protection challenge relied solely on Pennsylvania state authority and precedent. Since the Pennsylvania state courts' judgment rests on an adequate non-federal basis there is no substantial federal question at issue, and this appeal should be dismissed.

## CONCLUSION

For the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests that this appeal be dismissed, or in the alternative, this Court should affirm the judgment of the Supreme Court of Pennsylvania which dismissed this appeal as improvidently granted.

Respectfully submitted,

ALAN M. RUBENSTEIN
*District Attorney*
STEPHEN B. HARRIS
*Chief of Appeals*
*Attorneys for Appellee*